INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	5
A. The predecessor of the present act, the Food and Drugs Act of 1906, permitted seizure of goods which became contaminated after interstate transportation while held in the original package	7
B. The general purpose of the 1938 Act was to extend the range of federal protection in the interest of the consumer	9
C. The decision below would seriously hamper the enforcement of the Food, Drug, and Cosmetic Act	14
Conclusion	15

CITATIONS

Cases:	
Kirschbaum Co. v. *Walling*, 316 U. S. 517	6
McDermott v. *Wisconsin*, 228 U. S. 115	12
McLeod v. *Threlkeld*, 319 U. S. 491	6
United States v. *American Trucking Associations*, 310 U. S. 534	14
United States v. *Dotterweich*, 320 U. S. 277	10, 11
United States v. *Jackson*, 280 U. S. 183	14
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77	14
United States v. *Underwriters Association*, 322 U. S. 533	5
Statutes:	
Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1044, 21 U. S. C. 301, *et seq.*:	
Section 201 (b)	2
Section 304 (a)	2, 3, 5, 10, 12
Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 771, Section 10	3, 7
Miscellaneous:	
Annual Reports of the Federal Security Agency, Food and Drug Administration, 1941–1942, 1942–1943, pp. 20–21	12
Annual Report of the Federal Security Agency, Food and Drug Administration, 1944, p. 12	12
Annual Report of the Federal Security Agency, Section One, Food and Drug Administration, 1945, pp. 20, 21, 60	12, 15

Miscellaneous—Continued

	Page
Dunn, *Federal Food, Drug and Cosmetic Act* (1938)	10
H. Rep. No. 551, 79th Cong., 1st sess. p. 10	14
H. Rep. No. 2139, 75th Cong., 3d sess., pp. 1, 4	10, 11
Hearings before the Committee on Agriculture and Forestry, United States Senate, 71st Cong., 2d sess. on Administration of Federal Food and Drugs Act, February 12 to June 30, 1930, pp. 369, 371, 372, 408	8
Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Cong., 1st sess., on the Department of Labor-Federal Security Agency Appropriation Bill for 1946, Part 2, pages 102–106	13
Report of the Chief of the Food and Drug Administration to the Secretary of Agriculture, August 29, 1931, p. 17	9
Report of the Chief of the Food and Drug Administration, 1937, to the Secretary of Agriculture, September 3, 1937, p. 13	9
Report of the Chief of the Food and Drug Administration, 1938, to the Secretary of Agriculture, August 30, 1938, p. 10	9
Report of the Commissioner of Food and Drugs, 1941 to the Federal Security Administrator, October 3, 1941, p. 7	12
S. Rep. No. 152, 75th Cong., 1st sess., p. 1	10
S. Rep. No. 361, 74th Cong., 1st sess., accompanying S. 5	11
S. Rep. No. 493, 73d Cong. 2d sess., accompanying S. 2800, p. 19	11

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

PHELPS DODGE MERCANTILE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court for the District of Arizona, sustaining respondent's exception to and dismissing an amended libel for the condemnation of certain food.

OPINION BELOW

The opinion of the circuit court of appeals (R. 28–30) is reported at 157 F. 2d 453. The findings of fact and conclusions of law of the district court appear at pp. 13–14 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 25, 1946 (R. 31). The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether food which becomes adulterated after interstate transportation and while stored under unsanitary conditions at the warehouse of the consignee in the original packages is adulterated "while in interstate commerce" within the meaning of Section 304 (a) of the Federal Food, Drug, and Cosmetic Act.

STATUTES INVOLVED

Section 304 (a) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1044, 21 U. S. C. 334 (a), provides as follows:

> Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found; * * *[1]

[1] Section 201 (b) of the Act (21 U. S. C. 321 (b)) defines interstate commerce as follows:

"(b) The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body."

Section 10 of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 771, provided as follows:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * *

STATEMENT

Pursuant to Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, *supra,* the United States, on December 27, 1944, filed a libel in the United States District Court for the District of Arizona for the condemnation of 150 cartons of spaghetti and 25 cartons of macaroni in the possession of the respondent (R. 2–5). The libel, as amended, alleged that these articles had been shipped as foods from Denver, Colorado, to respondent in Douglas, Arizona, in February and June 1943; that the foods were adulterated by reason of the presence therein of insect fragments, rodent hairs, and rodent excreta; and that they were so contaminated while held under unsanitary

conditions in the original packages at respondent's warehouse in Douglas, Arizona (R. 8–11).

Respondent filed an exception to the amended libel on the ground that it failed to allege that the food was adulterated when introduced into or while in interstate commerce, as required by Section 304 (a) of the Federal Food, Drug, and Cosmetic Act (R. 12). On argument, it was stipulated that the food became adulterated while resting in the warehouse of respondent after shipment (R. 13–14).

The district court held that, since shipment by interstate carrier had been completed before the food became contaminated, the amended libel failed to state facts sufficient to constitute a cause of action (R. 14). It accordingly sustained the exception and dismissed the libel (R. 14–15). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In affirming the judgment of the district court sustaining respondent's exception to the amended libel and dismissing the libel.

2. In holding that food, which becomes adulterated after it has been transported interstate and while it is being held by the consignee in a warehouse in the original packages, is not adulterated "while in interstate commerce" within the mean-

ing of Section 304 (a) of the Federal Food, Drug, and Cosmetic Act.

REASONS FOR GRANTING THE WRIT

In holding that food which became adulterated while stored under unsanitary conditions in a warehouse in the original package, was not adulterated "while in interstate commerce" within the purview of Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, the court below construed the phrase "while in interstate commerce" in a manner inconsistent with the Congressional intent and contrary to a long standing administrative interpretation of that phrase. As will be shown in more detail below, the result of the narrow interpretation given to the phrase "while in interstate commerce" by the circuit court of appeals will be seriously to handicap the Food and Drug Administration in its task of keeping adulterated foods from reaching the ultimate consumer.

It is clear that, in providing for the seizure of goods adulterated "while in interstate commerce", Congress intended to cover more than goods adulterated in the course of "interstate transportation". "Interstate commerce" is, unquestionably, a broader term than "interstate transportation." *United States* v. *Underwriters Association,* 322 U. S. 533, 539, 549–550. On the other hand, there can equally be no doubt that, at some point after interstate transportation, inter-

state commerce does come to an end. In essence, the question here is the nature of the test Congress intended to be applied in determining when, after interstate transportation, goods cease to be in interstate commerce for the purposes of the Federal Food, Drug, and Cosmetic Act.

As this Court has pointed out, "there is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod* v. *Threlkeld,* 319 U. S. 491, 495. And in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520–521, this Court said:

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. * * *

For these reasons, decisions construing the reach of federal authority under other statutes, as, for example, the Fair Labor Standards Act, are not necessarily dispositive in determining the meaning of "interstate commerce" as that term is used in the Federal Food, Drug, and Cosmetic Act. The genesis of the latter statute, its

purposes, and the scope of its administrative application have much more significance in determining the extent to which Congress has exercised federal power. It is to these considerations that we now turn.

A. *The predecessor of the present act, the Food and Drugs Act of 1906, permitted seizure of goods which became contaminated after interstate transportation while held in the original package.*—The present statute had its origin in the Food and Drugs Act of 1906, which, in Section 10, the predecessor of the seizure provision now under consideration, provided as follows:

> Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * *

Under the literal language of this section, foods which became adulterated after interstate transportation but which remained unloaded, unsold, or in the original unbroken packages, were subject to seizure and were in fact regularly so seized. Sub-

sequent to the enactment of the 1906 Act, hundreds of decrees of condemnation were entered by default with respect to foods and drugs which were found to be adulterated while in their original packages at the time of seizure, but which probably became adulterated after interstate transportation. The propriety of effecting such seizures under the 1906 Act appears never to have been questioned.

This practice of the Food and Drug Administration was known to Congress before the 1938 Act was passed. In 1930, Mr. Walter G. Campbell, the Chief of the Food and Drug Administration, testified at hearings before the Senate Committee on Agriculture and Forestry that anaesthetic ether, even though held under most favorable conditions, will deteriorate and decompose and form aldehydes and peroxides which may render the product injurious to health, and that since it could not be ascertained when such adulteration occurred, it was the practice of the administration to seize consignments of decomposed ether after interstate shipment without regard to the time the decomposition occurred.[2]

The annual reports of the Food and Drug Administration likewise contained a number of references to the interpretation of the 1906 Act as

[2] Hearings before the Committee on Agriculture and Forestry, United States Senate, 71st Cong., 2d sess., on Administration of Federal Food and Drugs Act, February 12 to June 30, 1930, pp. 369, 371, 372, 408.

authorizing seizure of goods adulterated after interstate transportation. In the report for the fiscal year 1931, reference was made to the continued regulatory work against impure anaesthetic ether, and again note was made of its tendency to develop aldehydes and peroxides "while the ether is in storage."[3] The report for the fiscal year 1937 referred to 34 samples of ether from consignments shipped a year or more before sampling which could have deteriorated after transportation.[4] The report for the fiscal year 1938 contained this significant statement in reference to the campaign against impure candy.[5]

> Objectionable candy *subject to the law* may be found in any one of three categories: (1) *Material that was sound when shipped, but through improper storage became contaminated in the consignee's possession* * * *. [Italics added.]

B. *The general purpose of the 1938 Act was to extend the range of federal protection in the interest of the consumer.*—There is no indication that Congress, in the 1938 Act, intended to limit the scope of the authority previously exercised

[3] Report of the Chief of the Food and Drug Administration to the Secretary of Agriculture, August 29, 1931, p. 17.

[4] Report of the Chief of the Food and Drug Administration, 1937, to the Secretary of Agriculture, September 3, 1937, p. 13.

[5] Report of the Chief of the Food and Drug Administration, 1938, to the Secretary of Agriculture, August 30, 1938, p. 10.

under the 1906 Act to seize adulterated food. On the contrary, as this Court noted in *United States* v. *Dotterweich*, 320 U. S. 277, 282, "Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it." See also H. Rep. No. 2139, 75th Cong., 3d sess., p. 1; S. Rep. No. 152, 75th Cong., 1st sess., p. 1.

An examination of the numerous hearings and debates and of the numerous committee reports which were issued during the five years from 1933 to 1938, during which time the Congressional purpose to enact a stronger food and drug act was clearly indicated,[6] reveals no suggestion of disapproval by either Congress or the industries concerned of the long-standing administrative practice of seizing foods which became adulterated after interstate transportation and while held in the original package. Yet the legislative history of the act discloses that other administrative practices, as to which either Congress or the industries concerned had any question whatever, were discussed and debated in minute detail.

It seems evident, therefore, that when Congress, in the 1938 Act, provided for the seizure of goods adulterated "while in interstate commerce," it was merely stating in more concise fashion a concept of interstate commerce spelled out in more

[6] The legislative materials of this period are collected in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938).

detail in the original act, i. e., goods in interstate transit and goods remaining unloaded, unsold or in the original package. Cf. *United States* v. *Dotterweich*, 320 U. S. 277, 281–282. The reports on various bills which led to the passage of the 1938 act indicate that Congress believed that the present Section 304 (a) embodies the substance of the former section. Thus, S. Rep. No. 493, 73d Cong., 2d sess., accompanying S. 2800, stated at page 19, in respect of the provision of that bill which provided for seizure of food in interstate commerce that is adulterated or misbranded:

> Section 10 of the Food and Drugs Act provides for the seizure by a process of libel for condemnation of adulterated or misbranded food and drugs found *in the channels of interstate commerce.* Paragraph (a) of section 16 would continue in effect this form of remedial action against adulterated or misbranded food, drugs, or cosmetics. [Italics added.]

To the same effect is S. Rep. No. 361, 74th Cong., 1st sess., accompanying S. 5. One of the last reports on the new legislation, H. Rep. No. 2139, 75th Cong., 3d sess., p. 4, stated as to the present Section 304:

> Section 304 repeats in substance the seizure provision of the present law * * *.

The 1906 Act had been interpreted by this Court as extending federal power over food and drugs "unloaded, unsold, or in original unbroken

packages," to such an extent that a state statute, prescribing a method of labelling different from that of the federal act, was held an unconstitutional interference with interstate commerce even as applied to articles after the original package had been broken. *McDermott* v. *Wisconsin,* 228 U. S. 115, 136. In the absence of any indication that, in 1938, Congress intended to adopt a different or narrower definition, it is reasonable to assume that, in using the phrase "while in interstate commerce" in Section 304 (a), Congress intended to adopt a test of interstate commerce which extended at least as far as that of the old act.

This interpretation of the new act has consistently been followed by the administrative agency charged with its enforcement. In the years since the passage of the 1938 Act, the Government has continued its former policy of seizing goods found in warehouses in an adulterated condition, without endeavoring to ascertain whether the adulteration existed at the time of the interstate transportation or occurred thereafter. This practice has repeatedly been reported to Congress in the annual reports of the Food and Drug Administration.[7]

[7] Report of the Commissioner of Food and Drugs, 1941, to the Federal Security Administrator, October 3, 1941, p. 7; Annual Reports of the Federal Security Agency, Food and Drug Administration, 1941–1942, 1942–1943, pp. 20–21; Annual Report of the Federal Security Agency, Food and Drug Administration, 1944, p. 12; Annual Report of the Federal Security Agency, Section One, Food and Drug Administration, 1945, pp. 20, 21.

And at a recent hearing before a subcommittee of the House Committee on Appropriations, the present Commissioner of Food and Drugs, Dr. Paul B. Dunbar, adverted to the serious problem of adulteration of food held in storage warehouses under unsanitary conditions after interstate shipment.[8]

In the course of his testimony, he said (p. 103):

> One of the pathetic things about this is that a *material portion of these foods that we seize leave the factory in a clean and wholesome state, and at some stage in the shipment from manufacturer to ultimate consumer they are stored under conditions whereby they were exposed to rodents and to insects, and become utterly filthy.* [Italics supplied.]

Significantly, the Appropriations Committee recommended, and Congress enacted, an increase of over $250,000 for the Food and Drug Administration for the fiscal year 1946, the Committee's report stating that *"This agency is doing some of the most important work performed by the Government for its citizens. In addition actually to removing from channels of commerce impure and contaminated food and drugs,* much research has and is being done along lines most beneficial to

[8] Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Cong., 1st sess., on the Department of Labor-Federal Security Agency Appropriation Bill for 1946, Part 2, pages 102–106.

improving the health of the Nation." H. Rep. No. 551, 79th Cong., 1st sess., p. 10 [Italics supplied.]

This long standing interpretation of the Act by the agency charged with its enforcement is entitled to great weight. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549; *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77, 84; *United States* v. *Jackson,* 280 U. S. 183, 193. These decisions were disregarded by the court below when it failed to give due consideration to the administrative interpretation.

C. *The decision below would seriously hamper the enforcement of the Food, Drug, and Cosmetic Act.*—As a practical matter, the bulk of federal inspection activities under the Food, Drug, and Cosmetic Act takes place after merchandise has been transported interstate and while it is being stored in warehouses or similar establishments pending further disposition. In many instances it is difficult, if not impossible, to prove that deterioration or adulteration took place before or during shipment, rather than at the point of destination. During the year 1945, the number of seizures under the Food and Drug act totalled 3,112. Of this total, 2,411 involved foods, and, of these, 1,723 were seized because of decomposition, insect or rodent infestation or other filth in the foods. *Annual Report of the Federal Security*

Agency, sec. 1, Food and Drug Administration, 1945, p. 60. The Commissioner of Food and Drugs estimates that of these 1,723 seizures, approximately 50 percent involved either known terminal infestation, or infestation the origin of which it would be extremely difficult or impossible to establish. Consequently, a holding that the Government must prove that the deterioration occurred before or during actual transportation, rather than at the destination point in the original packages, will permit not only tremendous quantities of commodities that become adulterated after interstate shipment to reach the consuming public, but, in addition, large quantities of foods and drugs that actually became adulterated while in transit.

CONCLUSION

In the light of the history, purpose, and administrative practicalities of the Federal Food, Drug, and Cosmetic Act of 1938, we submit that in providing for the seizure of goods adulterated "while in interstate commerce," Congress intended to exercise federal power over goods which become contaminated after interstate transportation while stored in a warehouse in the original package. As we have shown, the decision below seriously hampers the practical administration of the Act. The resolution of the question presented by this

petition is one of importance to the Food and Drug Administration and to the consuming public. We, therefore, respectfully urge that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946